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No. 99-1144

# In the Supreme Court of the United States

CLEOPATRA MCDOUGAL-SADDLER, PETITIONER

*v.*

ALEXIS M. HERMAN, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

HENRY L. SOLANO
*Solicitor of Labor*
ALLEN H. FELDMAN
*Associate Solicitor*
EDWARD D. SIEGER
*Attorney*
*Department of Labor*
*Washington, D.C. 20210*

## QUESTIONS PRESENTED

Section 8128(b) of Title 5, United States Code, provides that a decision of the Secretary of Labor in allowing or denying a payment under the Federal Employees' Compensation Act (FECA) "is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." The questions presented are:

1. Whether Section 8128(b) precludes a district court from reviewing a decision of the Secretary denying payment under FECA where the claimant alleges that the Secretary violated a clear statutory mandate.

2. Whether the Secretary violated a clear statutory mandate by declining to appoint an additional physician to examine petitioner.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 18 |
| Appendix A | 1a |
| Appendix B | 18a |
| Appendix C | 20a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Avedis* v. *Herman*, 25 F. Supp. 2d 256 (S.D.N.Y. 1998), appeal withdrawn, No. 99-6053 (2d Cir. May 3, 1999) | 13 |
| *Becker, In re*, 31 E.C.A.B. 441 (1980) | 13 |
| *Blanc* v. *United States*, 244 F.3d 708 (2d Cir.), cert. denied, 355 U.S. 874 (1957) | 9 |
| *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) | 15 |
| *Board of Governors of Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32 (1991) | 16 |
| *Brumley* v. *Department of Labor*, 28 F.3d 746 (8th Cir. 1994), cert. denied, 513 U.S. 1082 (1995) | 10 |
| *Czerkies* v. *Department of Labor*, 73 F.3d 1435 (7th Cir. 199[illegible] | 16 |
| *Dismuke* v. *United States*, 297 U.S. 167 (1936) | 16 |
| *Hanauer* v. *Reich*, 82 F.3d 1304 (4th Cir. 1996) | 9, 10, 11, 14 |
| *Johnson* v. *Robison*, 415 U.S. 361 (1974) | 16 |
| *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768 (1985) | 9 |
| *Mason, In re*, 4 E.C.A.B. 96 (1950) | 13 |
| *Owens* v. *Brock*, 860 F.2d 1363 (6th Cir. 1988) | 10 |
| *Phares, In re*, 15 E.C.A.B. 146 (1963) | 13 |

Cases—Continued: Page

*Paluca* v. *Secretary of Labor*, 813 F.2d 524 (1st Cir.), cert. denied, 484 U.S. 943 (1987) ..... 10, 17
*Soderman* v. *Civil Serv. Comm'n*, 313 F.2d 694 (9th Cir. 1962), cert. denied, 372 U.S. 968 (1963) ..... 16
*Soeken* v. *Herman*, 35 F. Supp. 2d 99 (D.D.C. 1999), aff'd mem., No. 99-511, 1999 WL 1215942 (D.C. Cir. Nov. 23, 1999) ..... 11
*Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81 (1991) ..... 9
*Staacke* v. *Secretary of Labor*, 841 F.2d 278 (9th Cir. 1988) ..... 9, 10, 11
*Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994) ..... 15
*Traynor* v. *Turnage*, 485 U.S. 535 (1988) ..... 16, 17
*United States* v. *Fausto*, 484 U.S. 439 (1988) ..... 15, 16
*White* v. *United States*, 143 F.3d 232 (5th Cir. 1998) ..... 9
*Wise, In re*, 4 E.C.A.B. 87 (1950) ..... 13
*Woodruff* v. *Department of Labor*, 954 F.2d 634 (11th Cir. 1992) ..... 9-10

Statutes and regulations:

Rehabilitation Act of 1973, 29 U.S.C. 794 ..... 17
Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*:
5 U.S.C. 8102(a) ..... 2
5 U.S.C. 8121 ..... 2
5 U.S.C. 8123(a) ..... 3, 4, 5, 6, 7, 8, 12, 14, 17
5 U.S.C. 8124 ..... 3, 8
5 U.S.C. 8124(a) ..... 12
5 U.S.C. 8128 ..... 3
5 U.S.C. 8128(a) ..... 9
5 U.S.C. 8128(b) ..... *passim*
5 U.S.C. 8128(b)(2) ..... 6
5 U.S.C. 8145 ..... 2, 8, 12
5 U.S.C. 8149 ..... 2, 9

Statute and regulations—Continued: Page

38 U.S.C. 211(a) (1970) ..... 16
20 C.F.R. Pt. 10 (1998) ..... 2
Section 10.2 ..... 2
Section 10.130 ..... 2
Section 10.131 ..... 3, 9
Section 10.138 ..... 3, 9
Section 10.139 ..... 3, 9
Section 10.301 ..... 12
Section 10.321 (1999) ..... 13
Section 10.502 (1999) ..... 13

Miscellaneous:

63 Fed. Reg. (1998):
p. 65,284 ..... 2, 13
p. 65,294 ..... 13

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### OPINIONS BELOW

The opinion of the court of appeals on panel rehearing (Pet. App. 1a-17a) is reported at 184 F.3d 207. The court of appeals' initial opinion (Pet. App. 18a-37a) is reported at 161 F.3d 198, and the order vacating that opinion (App., *infra*, 20a) is reported at 169 F.3d 178. The district court's memorandum and order (Pet. App. 38a-47a) is not yet reported, but can be found at 1997 WL 835414. The decision and order of the Department of Labor Employees' Compensation Appeals Board (App., *infra*, 1a-17a) is reported at 47 E.C.A.B. 480, and the Board's order denying reconsideration (App., *infra*, 18a-19a) is unreported.

## JURISDICTION

The court of appeals issued its decision on panel rehearing on July 2, 1999, and denied rehearing on October 6, 1999 (Pet. App. 48a). The petition for a writ of certiorari was filed on January 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Federal Employees' Compensation Act (FECA) provides workers' compensation benefits to employees of the United States who become disabled or die from work-related injuries. 5 U.S.C. 8102(a). The Secretary of Labor is authorized to "administer, and decide all questions arising under" FECA, and to make rules and regulations necessary for the administration and enforcement of the statute. 5 U.S.C. 8145, 8149. The Secretary has delegated her authority to administer and enforce the statute to the Director, Office of Workers' Compensation Programs (OWCP). 20 C.F.R. 10.2.[1] As required by statute, 5 U.S.C. 8149, the Secretary has also created an Employees' Compensation Appeals Board (ECAB) to hear and make final decisions on appeals from OWCP determinations, 20 C.F.R. 10.301.

When a claim is filed, OWCP investigates and obtains necessary medical evidence. 5 U.S.C. 8121; 20 C.F.R. 10.130. An employee must submit to examination by a medical officer of the United States, or by a physician designated and approved by the Secretary, and may

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[1] Unless otherwise stated, this brief, like the petition, cites the regulations in effect at the time the decisions in this case were issued. See 20 C.F.R. Pt. 10 (1998). The current regulations became effective January 4, 1999, but do not apply to any issue decided for the first time before their effective date. See 63 Fed. Reg. 65,284 (1998).

have a physician designated by the employee present to participate in the examination. 5 U.S.C. 8123(a). The statute further provides that, "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. 8123(a).

When OWCP makes a decision adverse to a claimant, the claimant can either request a hearing before an OWCP hearing representative, request reconsideration before OWCP, or appeal to the ECAB. 5 U.S.C. 8124, 8128; 20 C.F.R. 10.131, 10.138, 10.139. Section 8128(b) of Title 5, United States Code, makes those mechanisms for administrative review exclusive, and specifically precludes judicial review of the Secretary's decisions under FECA:

> The action of the Secretary or [her] designee in allowing or denying a payment under [FECA] is—(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. 8128(b).

2. In May 1982 and in April 1985, petitioner injured her back, neck and shoulder while working for the United States Postal Service. Pet. App. 2a-3a, 39a. She received FECA benefits for temporary total disability on both occasions. *Ibid.* In 1987, her treating physician, Dr. Schwartz, reported that she was totally disabled "for the near indefinite future." *Id.* at 3a; App., *infra*, 1a, 3a-4a. OWCP referred petitioner to an orthopedic surgeon, Dr. Simon, who concluded that petitioner had a slowly developing degenerative condition that was not due to any specific incidents of trauma occurring at

work. App., *infra*, 4a; see Pet. App. 3a. OWCP terminated petitioner's benefits in November 1988, but reinstated them in February 1989 on the ground that petitioner had not received a copy of Dr. Simon's report. Pet. App. 4a; App., *infra*, 5a. Because Dr. Simon's evaluation was by then almost two years old, OWCP also asked him to do a reevaluation. App., *infra*, 5a; Pet. App. 4a.

In October 1989, Dr. Simon again concluded that petitioner had a degenerative condition that was not caused by her workplace injuries. App., *infra*, 6a-7a; Pet. App. 39a. After obtaining further testing and a report from a radiologist, however, Dr. Simon concluded that petitioner had abnormalities beyond degenerative changes. App., *infra*, 7a; Pet. App. 4a, 39a-40a. Dr. Simon did not state whether, in his view, those abnormalities were caused by a workplace injury. He did state, however, that the abnormalities were only partially disabling and that petitioner could return to some form of work. App., *infra*, 8a; Pet. App. 22a.

Based on all the submitted reports, OWCP found a conflict in medical opinion and in 1991 referred petitioner to another orthopedic surgeon, Dr. Williams, pursuant to 5 U.S.C. 8123(a). Pet. App. 4a-5a, 40a; App., *infra*, 8a. Section 8123(a) provides that, "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." In 1992, after examining petitioner, her medical records—including x-ray reports and findings from 1982, 1984, and 1987, as well as a 1989 CT scan—and the reports of the other physicians who examined her, Dr. Williams reported that petitioner had no work-related disability. App., *infra*, 9a-11a; see Pet. App. 5a, 40a. Based on Dr.

Williams' report, OWCP decided to terminate petitioner's compensation. After affording petitioner a hearing and opportunities to present additional evidence, OWCP adhered to that decision. See Pet. App. 5a-6a; App., *infra*, 11a- 12a.

Petitioner appealed to the ECAB. She argued that Dr. Williams was not a third physician under 5 U.S.C. 8123(a) because there was no conflict between her physician and the orthopedic surgeon, Dr. Simon, to whom OWCP had previously referred her. App., *infra*, 13a. The ECAB agreed with petitioner on that point, App., *infra*, 15a-16a, but nevertheless affirmed OWCP's termination of benefits. The ECAB reasoned that, although Dr. Williams' reports were not entitled to the "special weight" that the ECAB gives to the opinion of an impartial medical specialist appointed in response to a conflict of medical opinion under 5 U.S.C. 8123(a), the reports could "still be considered for their own intrinsic value and can still constitute the weight of the medical evidence." App., *infra*, 16a-17a. Weighing the medical evidence, the ECAB concluded that Dr. Williams' reports were the most reliable and probative evidence and were sufficient to establish that any disability related to petitioner's 1982 and 1985 injuries had ended by September 1992. *Ibid.* The report of Dr. Schwartz, in contrast, was conclusory in nature and failed to justify the conclusion that petitioner's disability was causually related to her employment. App., *infra*, 15a. The ECAB subsequently denied petitioner's request for reconsideration. App., *infra*, 18a-19a.

3. In March 1997, petitioner filed a district court action alleging, among other things, that the ECAB violated a clear statutory mandate in 5 U.S.C. 8123(a). In particular, she argued that Section 8123(a) required the Secretary to appoint a third physician to resolve the

disagreement between her physician and Dr. Williams, and that the Secretary had failed to do so. Pet. App. 41a. In particular, she argued that *any* inconsistency in medical opinions was sufficient to trigger Section 8123(a), and she challenged the Secretary's policy of weighing the evidence to determine whether appointment of a third physician is necessary.[2]

The Secretary filed a motion to dismiss, which the district court granted. Pet. App. 38a-47a. The district court noted that 5 U.S.C. 8128(b)(2) declares that the Secretary's decisions respecting FECA claims are "not subject to review by another official of the United States or by a court by mandamus or otherwise." Nevertheless, the court assumed for the sake of argument that it would have jurisdiction to hear the suit (notwithstanding 5 U.S.C. 8128(b)) if petitioner could show that the Secretary had violated a clear statutory command. Pet. App. 45a-46a. Petitioner, however, had failed to show such a violation. *Ibid.* Section 8123(a), the district court reasoned, does require the appointment of a third physician to resolve a "disagreement" between the employee's physician and the physician for the government. But it does not set forth the quantum of proof or credibility an opinion must have before it is sufficient to create a genuine "disagreement" within the meaning of the statute. As a result, the district court concluded, Section 8123(a) can plausibly be read to permit some weighing of medical evidence, under specified criteria, to ensure that a material disagreement exists, which is what the Secretary did here. *Id.* at 43a.

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[2] Petitioner also alleged that the Secretary's termination of her benefits violated due process. Pet. App. 42a. The district court rejected that argument, *id.* at 42a-45a, and petitioner neither raised it on appeal, *id.* at 9a, 12a, nor raises it in this Court.

Because the ECAB did not violate a clear statutory mandate, the district court held judicial review was not available—even if one were to recognize a "clear statutory mandate" exception to the preclusion provided by 5 U.S.C. 8128(b). Pet. App. 46a.

4. The court of appeals initially affirmed on the ground that petitioner lacked standing to claim a violation of 5 U.S.C. 8123(a). Pet. App. 18a-37a. The court reasoned that, although petitioner raised a "plausible" challenge to the Secretary's policy of weighing evidence before appointing a third physician in response to conflicting medical opinions, in this case a third physician (Dr. Williams) had been appointed, and petitioner had received the examination provided by Section 8123(a). Pet. App. 31a-33a. Accordingly, the court held that petitioner had suffered no legal harm as a consequence of the policy she sought to challenge. *Id.* at 35a-37a.

In response to petitioner's request for rehearing, the panel vacated its decision and affirmed the district court on different grounds. In particular, it held that 5 U.S.C. 8128(b) deprived the district court of subject matter jurisdiction. Pet. App. 1a-17a.[3] Initially, the court stated that it was "difficult to square" the Secretary's policy, under which the Secretary would weigh medical reports when determining whether to appoint a third physician, with the statutory mandate to appoint a third physician "if there is disagreement" between the government's and the employee's physicians. *Id.* at 8a (quoting 5 U.S.C. 8123(a)). The court

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[3] The Secretary supported rehearing on the ground that the panel's initial decision had improperly reviewed the Secretary's action in terminating petitioner's benefits instead of dismissing the appeal for lack of subject matter jurisdiction.

reasoned, however, that Congress was "absolutely free" to limit the extent to which it consents to suit against the United States or its instrumentalities and that Section 8128(b) could "hardly be plainer" in barring judicial review altogether. Pet. App. 11a. The court concluded that nothing in FECA's legislative history permitted an exception that would allow judicial review of an asserted violation of a clear statutory mandate. *Id.* at 12a. The language of 5 U.S.C. 8128(b), the court of appeals explained, provides "clear and convincing evidence that Congress intended to deny district courts jurisdiction to review decisions of the [Secretary]," and "is broad enough to include both policy or rule making decisions of the Secretary as well as individual benefit determinations." Pet. App. 16a.

## ARGUMENT

Petitioner argues (Pet. 4-7) that the Secretary violated the clear statutory mandate of 5 U.S.C. 8123(a) by failing to appoint another physician to resolve an alleged disagreement between her physician (Dr. Schwartz) and Dr. Williams. Review is warranted, petitioner asserts, to resolve a conflict in the courts of appeals on whether FECA allows judicial review of Secretarial action that violates a clear statutory mandate. This case, however, would have been resolved the same way regardless of the circuit in which it arose, and it is far from clear that the alleged conflict petitioner identifies is meaningful and genuine. As a result, further review is not warranted.

1. Congress gave the Secretary the authority to "administer, and decide all questions arising under" FECA. 5 U.S.C. 8145. Consistent with that grant of authority, Congress provided for hearings, review, and appeal within the Department of Labor. 5 U.S.C. 8124,

8128(a), 8149. See also 20 C.F.R. 10.131, 10.138, 10.139. At the same time, Congress declined to provide for judicial review of the Secretary's actions on such claims. In particular, 5 U.S.C. 8128(b) declares:

> The action of the Secretary * * * in allowing or denying a payment * * * is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review * * * by a court by mandamus or otherwise.

This Court has twice recognized that FECA's prohibition against judicial review uses the kind of "unambiguous and comprehensive" language that Congress "typically employs" when it "intends to bar judicial review altogether." *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, 779-780 & n.13 (1985); see *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 90 (1991). See also *White* v. *United States*, 143 F.3d 232, 237 (5th Cir. 1998) (explaining that the preclusion of review provision effectuates Congress's intent to establish a uniform system of compensation, administered by the Secretary, without generating the costs and delays associated with litigation); *Blanc* v. *United States*, 244 F.2d 708, 710 (2d Cir.) (similar), cert. denied, 355 U.S. 874 (1957). In this case, the court of appeals applied the plain terms of Section 8128(b) to conclude that petitioner's challenge to the Secretary's actions was not judicially cognizable.

Petitioner contends (Pet. 6-9) that the court of appeals' decision conflicts with *Hanauer* v. *Reich*, 82 F.3d 1304 (4th Cir. 1996), and *Staacke* v. *Secretary of Labor*, 841 F.2d 278 (9th Cir. 1988).[4] In this case, the

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[4] Petitioner errs in contending (Pet. 6) that the decision below also conflicts with *Woodruff* v. *Department of Labor*, 954 F.2d 634

court of appeals concluded that Section 8128(b) deprives district courts of jurisdiction to review the Secretary's actions, even if the Secretary violates a clear statutory mandate. Pet. App. 12a. See also *Paluca* v. *Secretary of Labor*, 813 F.2d 524, 527, 528 (1st Cir.), cert. denied, 484 U.S. 943 (1987). In contrast, in *Hanauer* and in *Staacke*, the courts of appeals stated that, if the Secretary violated a clear statutory mandate, Section 8128(b) would not deprive district courts of jurisdiction. *Hanauer*, 82 F.3d at 1309 (district courts have jurisdiction unless "a cursory review of the merits reveals that the Secretary did not violate a clear statutory mandate"); *Staacke*, 841 F.2d at 280-282 (finding no violation of a clear statutory mandate).

Despite the inconsistent language in those cases, it is not clear that a genuine circuit conflict exists. As petitioner recognizes (Pet. 6), no court of appeals has ever actually held the Secretary's action to be reviewable notwithstanding Section 8128(b). To the contrary, in both *Hanauer* and *Staacke*, the courts concluded that,

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(11th Cir. 1992), and *Brumley* v. *Department of Labor*, 28 F.3d 746 (8th Cir. 1994), cert. denied, 513 U.S. 1082 (1995). Neither *Woodruff* nor *Brumley* takes a position on whether district courts can review Secretarial action alleged to conflict with a "clear statutory mandate" notwithstanding Section 8128(b). *Woodruff* specifically found it unnecessary to decide that question. 954 F.2d at 640-641 n.14. And, while *Brumley* (inaccurately) characterizes *Woodruff* as having held such review to be permissible, *Brumley* itself did not state whether or not it was inclined to follow that characterization of *Woodruff*. 28 F.3d at 747. See also *Owens* v. *Brock*, 860 F.2d 1363, 1367 (6th Cir. 1988) (stating that courts have unanimously held that FECA prohibits judicial review of FECA benefit determinations "[e]xcept for cases alleging that the Secretary violated a claimant's constitutional rights or exceeded the scope of his congressional mandate").

because the Secretary had not violated a clear statutory mandate, Section 8128(b) barred judicial review. *Hanauer*, 82 F.3d at 1309-1311 (Secretary may decide not to pay benefits in a lump sum for a class of cases instead of adjudicating individual requests for lump sum payments); *Staacke*, 841 F.2d at 281 (Secretary may interpret statutory requirement to pay a scheduled award "in addition to" temporary partial disability benefits to mean pay the award subsequent to such benefits). For that reason, the Third Circuit in this case characterized the language on which petitioner relies from *Hanauer* and *Staacke* as dictum. Pet. App. 17a n.2.

Moreover, *Staacke* and *Hanauer* are not inconsistent with complete foreclosure of judicial review, even where the plaintiff alleges violation of a clear statutory mandate. In *Staacke*, the Ninth Circuit held that, because the Secretary has "virtually limitless" discretion to make policy choices under FECA, "there can be no review based on a violation of a clear statutory mandate." *Staacke*, 841 F.2d at 282. At least one court has therefore read *Staacke* as declaring that, while a "clear statutory mandate" exception to Section 8128(b)'s preclusive scope may exist in theory, in practice the Secretary's expansive discretion under the statute precludes that "clear statutory mandate" standard from ever being met. *Soeken* v. *Herman*, 35 F. Supp. 2d 99, 103 (D.D.C. 1999) (*Staacke* "rejected the 'statutory mandate' exception"), aff'd mem., No. 99-511, 1999 WL 1215942 (D.C. Cir. Nov. 23, 1999). The Fourth Circuit, which has recognized the possibility of review where a clear statutory mandate is violated, *Hanauer*, 82 F.3d at 1309, may yet reach the same conclusion. Thus, while there is language in *Staacke* and *Hanauer* that appears inconsistent with language in the opinion

below, the inconsistency may be of just that—language—and not of substance or results.

In any event, if the decision below is in tension with *Hanauer* and *Staacke*, this case is not an appropriate vehicle for resolving that tension. As the district court recognized, the "clear statutory mandate" exception to Section 8128(b)'s preclusive scope would not result in jurisdiction over this case even if that exception were recognized. See Pet. App. 45a-46a (finding no jurisdiction even assuming, *arguendo*, that a clear statutory mandate exception exists). Simply put, the Secretary's policy of "weighing" the evidence to ensure that any dispute genuinely constitutes a "disagreement" warranting the appointment of another physician does not violate a clear statutory mandate.

While Section 8123(a) explicitly requires the Secretary to appoint a third physician to make an examination "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee," 5 U.S.C. 8123(a),[5] it does not define what constitutes a "disagreement" within the meaning of that provision. Pursuant to her authority to "administer, and decide all questions arising under, this subchapter," 5 U.S.C. 8145, the Secretary has concluded that a "disagreement" between physicians warranting a further examination does not exist, for example, where the two allegedly conflicting opinions are not both so well-supported that a factfinder could reasonably credit either one. Thus, where one of the two reports or

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[5] Contrary to petitioner's assertions (Pet 3, 5), that Section does not give the "third physician" the authority to act as a factfinder. Instead, 5 U.S.C. 8124(a) expressly provides that "[t]he Secretary of Labor shall determine and make a finding of facts * * * ."

opinions is insufficient to support a judgment—because it is shown to be based on faulty assumptions, unsupported by objective evidence, unreasoned, or otherwise lacks the persuasiveness necessary to support an award or denial of benefits—there is no material "disagreement" within the meaning of the statute and no further examination is required. Under petitioner's construction of "disagreement," by contrast, the Secretary would have to send a claimant for further medical evaluation based on conclusory medical opinions that are insufficient to support an award of benefits—increasing costs and delays without producing benefits. *Avedis* v. *Herman*, 25 F. Supp. 2d 256, 264-265 (S.D.N.Y. 1998) (broader view of "disagreement" would find a "'conflict' between a Board-certified specialist providing a well-rationalized opinion and a non-specialist who may have merely checked a box on a form indicating the presence of causal relationship or disability without providing any explanation"), appeal withdrawn, No. 99-6053 (2d Cir. May 3, 1999); Pet. App. 32a (Secretary's reasoning). See Pet. App. 43a (citing FECA PM 2-810).[6] Because the Secretary's construc-

[6] Petitioner incorrectly asserts (Pet. 5) that the Secretary's weighing process was instituted in 1983. Before 1983, the ECAB often resolved conflicting evidence based on the weight of the evidence, see, *e.g.*, *In re Wallace E. Mason*, 4 E.C.A.B. 96, 97-98 (1950); *In re William D. Wise*, 4 E.C.A.B. 87, 89 (1950), and recognized that, in cases involving a conflict in medical opinion, whether an independent expert's opinion is necessary "depends on the nature of the particular conflict." *In re Ruth L. Becker*, 31 E.C.A.B. 441, 445 (1980). See also *In re Madge V. Phares*, 15 E.C.A.B. 146, 149 (1963). The Secretary's views on referrals and weighing have recently been codified. See 20 C.F.R. 10.321, 10.502 (1999); 63 Fed. Reg. 65,284, 65,294 (1998). Similarly, because the Secretary permissibly interprets the term "disagreement" to mean a disagreement from the perspective of the claims examiner (i.e.,

tion is manifestly reasonable, it would not be reviewable under a "clear statutory mandate" exception to 5 U.S.C. 8128(b), even if one were recognized. See *Hanauer*, 82 F.3d at 1309 ("If a cursory review of the merits reveals that the Secretary did not violate a clear statutory mandate," i.e., if the Secretary's construction is "plausible," then "the case must be dismissed for lack of subject matter jurisdiction.").[7]

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differing medical views of sufficient weight to be material to the claims adjudication so that the claims examiner cannot resolve the claim on the existing record), it is not relevant that FECA, before its 1966 codification, required referrals to a third physician for "any disagreement." See Pet. 2-3 n.1. The term "any" does not expand the term "disagreement" to include matters that are either irrelevant or resolvable by the claims examiner.

[7] Indeed, even under a much more modest standard of what constitutes a "disagreement" within the meaning of Section 8123(a), the evidence and opinions petitioner relies on would not be sufficient to establish a conflict. Dr. Williams explained that: (1) the type of injury petitioner incurred in 1982 and that flared up in 1985 was a soft tissue (strain) injury that is generally self-resolving, App., *infra*, 9a; (2) the pain petitioner was suffering ten years later in 1992 was caused by abnormalities/degeneration of the cervical and lumbar spine (bones), not soft-tissue problems, *ibid.*; and (3) the abnormalities and degeneration were not caused by a work-related incident, but were rather the product of genetic predisposition, age, and obesity, *id.* at 9a-10a. Moreover, Dr. Williams pointed out, the abnormalities did not appear in x-rays taken in 1982 and 1985 (shortly after petitioner's injury) but first appeared instead in 1987, after petitioner had been out of work for years. Because petitioner "had not been working during this interval," he explained, "there is no work-related trauma that produced the findings noted on x-rays in 1987." *Id.* at 11a, 14a. Dr. Williams' opinion was confirmed by the independent review conducted by another Board-certified orthopedic surgeon, Dr. Glazer, *id.* at 14a, and was consistent with the opinion of Dr. Simon, the other orthopedic surgeon who examined petitioner. See *id.* at 4a, 15a-16a (citing "genetic predisposition to

2. Alternatively, petitioner argues (Pet. 7-10) that the court of appeals' decision is inconsistent with *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1993), and *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984). According to petitioner, those cases permit judicial review to be precluded only where "five elements combine to demonstrate Congress' desire to cut off review: the reviewability statutory language, the structure of the statutory scheme, the statute's objectives, the legislative history, and the nature of the administrative action involved." Pet. 7. In fact, this Court has recognized that the general presumption favoring judicial review may be overcome by specific statutory language *or* by other reliable indicia of congressional intent. *Block*, 467 U.S. at 349. Thus, in *Block*, 467 U.S. at 345-349, and *Thunder Basin*, 510 U.S. at 207-216, the Court relied on implication rather than express statutory language to find that certain agency actions were not judicially reviewable. See also *United States* v. *Fausto*, 484 U.S. 439 (1988) (inferring

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degenerative disc disease" that is not "due to any specific incidents of trauma occurring at work."). To establish a conflict in medical opinions, petitioner relies on a statement by Dr. Schwartz—a physician not qualified in the relevant area of specialty—that the disability should be considered work-related because petitioner began suffering pain at the time of her injury in 1982, and the matter had not been resolved by 1992. *Id.* at 15a. But the Board consistently and sensibly has held that the mere fact that symptoms first occur at the time of an injury is not sufficient, without a supporting rationale, to demonstrate that symptoms occurring a decade later are causally related to the prior injury. *Ibid.* Nor does Dr. Simon's November, 1989, report create a genuine disagreement; while he noted that petitioner had "cervical discogenic abnormalities beyond degenerative changes," he nowhere suggested that those abnormalities were the result of a 1982 or 1985 soft-tissue strain. See App., *infra*, 16a.

an intent to preclude review from the statutory structure). This Court has never suggested that express statutory language is itself insufficient to preclude judicial review, and in fact has recognized the opposite. See *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (statute providing that "[n]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order under this section" provides the "clear and convincing evidence" of congressional intent sufficient to preclude judicial review).[8]

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[8] Petitioner argues (Pet. 11) that when this Court "has shut off review, it has been careful to note that alternative remedies existed for judicial relief." That is incorrect. See, *e.g.*, *Fausto*, 484 U.S. at 455 (no judicial action for backpay for federal employee who has no remedy under Civil Service Reform Act). It is well established that "[t]he United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise." *Dismuke* v. *United States*, 297 U.S. 167, 171-172 (1936) (citation omitted). Accordingly, the courts of appeals have uniformly recognized that Congress has authority to preclude judicial review of FECA claims. See *Soderman* v. *Civil Serv. Comm'n*, 313 F.2d 694, 695 (9th Cir. 1962) (citing additional cases), cert. denied, 372 U.S. 968 (1963); cf. *Czerkies* v. *Department of Labor*, 73 F.3d 1435 (7th Cir. 1996) (en banc) (courts of appeals and government have construed FECA not to prohibit review of substantial claims of constitutional violations); note 2, *supra* (noting that petitioner does not assert a constitutional violation before this Court). For similar reasons, petitioner's reliance (Pet. 9) on *Johnson* v. *Robison*, 415 U.S. 361 (1974), and *Traynor* v. *Turnage*, 485 U.S. 535 (1988), is misplaced. In those cases, the Court concluded that a statute barring judicial review of administrative decisions "on any question of law or fact *under any law administered by the Veterans' Administration*," 38 U.S.C. 211(a) (1970) (emphasis added), does not prohibit review of the constitutionality of the statute itself, *Johnson*, 415 U.S. at 373, or a claim that agency rules violate

Petitioner also argues that FECA's prohibition against judicial review of "[t]he action of the Secretary or [her] designee in allowing or denying a payment," 5 U.S.C. 8128(b), does not prohibit review of the Secretary's "actions in issuing rules and policies that fundamentally change the meaning and effect of statutory provisions." Pet. 8. Here, however, petitioner is not asking for mere review of a rule or policy statement. She seeks a declaration that the Secretary's action in terminating her benefits is not permitted by FECA and an injunction requiring the Secretary to restore benefits. See Pet. App. 36a. In other words, she seeks review of the application of the Secretary's policy to her claim for benefits, conduct that clearly qualifies as an "action of the Secretary * * * in allowing or denying a payment" within the meaning of 5 U.S.C. 8128(b).[9]

3. Petitioner also asks this Court to consider whether the Secretary's construction of 5 U.S.C. 8123(a) violates a clear statutory mandate. There is no division in circuit authority on the meaning of Section 8123(a); the court of appeals did not address that question; and the Secretary's construction of that

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another statute, such as the Rehabilitation Act of 1973, 29 U.S.C. 794, that is not "administered by the Veteran's Administration," see *Traynor*, 485 U.S. at 541, 543-544. Petitioner here does not challenge the constitutionality of FECA, but rather claims that the Secretary misconstrued FECA, the very statute the Secretary is charged with administering.

[9] Moreover, the premise of petitioner's argument would "distort[] the statute" by creating "the absurd result of permitting a court to strike down a policy statement of the Secretary, notwithstanding the court's inabiiity to review any subsequent individual adjudications for conformance with its policy decision." *Paluca*, 813 F.2d at 527.

provision is in any event correct (see pp. 12-14, *supra*). Accordingly, further review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

HENRY L. SOLANO
*Solicitor of Labor*
ALLEN H. FELDMAN
*Associate Solicitor*
EDWARD D. SIEGER
*Attorney*
*Department of Labor*

MARCH 2000

**APPENDIX A**

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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IN THE MATTER OF CLEOPATRA MCDOUGAL-SADDLER AND U.S. POSTAL SERVICE, POST OFFICE, PHILADELPHIA, PA.

*Docket No. 95-2634; Submitted on the Record; Issued March 20, 1996*

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**DECISION AND ORDER**

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether appellant's disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992.

On May 14, 1982 appellant, then a 39-year-old distribution clerk, filed a claim for an injury to her back, upper neck, and shoulders sustained on May 8, 1982 by handling trays of mail. Appellant stopped work on May 11, 1982 and received continuation of pay from that date until June 24, 1982, after which the Office of Workers' Compensation Programs began payment of compensation for temporary total disability.

Beginning August 1982, appellant was treated by Dr. David S. Schwartz, a Board-certified internist and cardiologist, who diagnosed cervical and lumbosacral strains and indicated that she was totally disabled. X-

rays of the cervical and lumbosacral spine and the right shoulder on June 14, 1982 showed no bony traumatic changes. In a report of a fitness-for-duty examination done on November 3, 1982, Dr. Henry S. Wieder, Jr., a Board-certified orthopedic surgeon, stated that appellant's cervical and lumbosacral strain were precipitated by her May 8, 1982 injury but were perpetuated by her obesity, faulty posture and body mechanics.

In a report dated December 14, 1983, Dr. Schwartz stated that appellant had experienced persistent and incapacitating neck and low back pain since her May 1982 injury. The Office referred appellant to the Pain Control Center of Temple University, where Dr. Edward J. Resnick, a Board-certified orthopedic surgeon, stated in a March 9, 1984 report that her objective findings were insufficient to correlate with her apparent degree of disablement, and diagnosed strains of the neck and back from history, exogenous obesity with possible postural musculo-ligamentous back strain and probable chronic pain syndrome. Upon appellant's discharge from this inpatient program from August 6 to 24, 1984, Dr. Resnick stated that appellant's level of pain had not changed but that she was much better able to control it and function with it.

After a fitness-for-duty evaluation on February 21, 1985 by Dr. Eugene L. Thomas of the employing establishment, the employing establishment offered and appellant accepted a reemployment offer as a distribution clerk with use of a high-back chair, no reaching above the shoulder, and no lifting, pushing, or pulling over 15 pounds. Appellant returned to work on March 31, 1985.

Appellant again stopped work on April 5, 1985. On April 8, 1985 she filed a claim for a recurrence of dis-

ability due to her May 8, 1982 employment injury. Appellant stated that on April 5, 1985, after casing mail for two hours, she began to feel sharp pain in the right side of her neck, which extended to her right shoulder and arm and to her entire back as she continued to work.

Dr. Schwartz examined appellant on April 6, 1985, diagnosed cervical and lumbar strain, and indicated that appellant was totally disabled.

By letter dated April 29, 1985, the Office advised appellant that the April 5, 1985 incident constituted a new injury, for which she should file a claim. On May 7, 1985 appellant filed a claim for a traumatic injury to her neck, shoulders, and upper and lower back sustained on April 5, 1985 by casing mail. Appellant received continuation of pay from April 6 to May 20, 1985, after which the Office again began payment of compensation for temporary total disability.

In a report dated June 17, 1985, Dr. Schwartz diagnosed cervical radiculopathy. In a report dated May 22, 1986, Dr. Schwartz diagnosed chronic pain syndrome including chronic lumbosacral strain and chronic cervical strain. In a report dated April 10, 1987, Dr. Schwartz stated:

> "The diagnosis is chronic cervical strain and chronic lumbosacral strain, with occasional radiculopathies. The clinical course over the last several months has been of intermittent worsening, whereby the patient finds herself mostly needing to be at complete bed rest. . . . [Appellant's] symptoms first started on May 8, 1982, and though I did not see her then, her history includes the pain in her low back and

neck starting while at work pulling heavy mail through a chute and tossing it in a bin. At this point, so many years later, we have to assume that she has chronic pain syndrome secondary to her initial work injury. Because of chronic debilitating pain and limited range of motion due to muscle stiffness and spasm, despite intensive physical therapy and medication, [appellant] is totally disabled from work at this time and for the near indefinite future."

In a report dated May 4, 1987, Dr. William H. Simon, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, diagnosed cervical and lumbar discogenic syndrome with cervical and lumbar nerve root irritation. Dr. Simon concluded:

"Her present findings are those of cervical and lumbar discogenic syndrome due to early degenerative disc disease in the cervical and lumbar spine. This is indicative of a genetic predisposition to degenerative disc disease and is not in my opinion due to any specific incidents of trauma occurring at work."

* * *

"There is no evidence that she sustained any acute injury that is responsible for this but that she has a slowly developing degenerative condition which limits the amount of work that she can do. She will have to decide whether she wishes to bear with the pain and continue her work or whether she wishes to retire from the work force."

On December 31, 1987 the Office notified appellant of the proposed termination of her compensation on the basis that her disability resulting from her employment injuries had ceased. Appellant submitted a report dated February 16, 1988 from Dr. Schwartz stating that her symptoms were "specifically due" to her May 8, 1982 injury, and that her April 5, 1985 injury "added to her previous cervical and lumbosacral strain." In a report dated April 28, 1988, Dr. Robert M. Glazer, a Board-certified orthopedic surgeon to whom Dr. Schwartz referred appellant, diagnosed chronic musculoskeletal pain syndrome, and stated that appellant's "extensive areas of pain complaint would be inconsistent with any of the discogenic or nerve root problems with which I am familiar," and that "[a]ny usual strain or sprain or soft tissue injury should have healed long ago. Therefore, it is my opinion that the present symptoms are most likely nonorganic in origin. Whether this is a conscious or unconscious situation, I am not able to say."

By decision dated December 19, 1988, the Office terminated appellant's compensation on November 20, 1988 on the basis that the weight of the medical evidence established that her disability from her employment injuries ceased by that date.

Appellant requested a hearing, and an Office hearing representative, by decision dated February 21, 1989, found that appellant was not afforded due process, as she was not provided with a copy of Dr. Simon's May 4, 1987 report, despite her request for it. The Office hearing representative remanded the case for reinstatement of compensation, and, as Dr. Simon's evaluation was almost two years old, for a reevaluation by Dr. Simon.

In a report dated October 25, 1989, Dr. Simon noted that appellant continued to complain of pain in the neck, shoulder, back, leg and hip "even without working." After describing his findings on physical examination and x-rays, Dr. Simon diagnosed mild degenerative joint disease and intervertebral disc disease of the cervical spine, moderate degenerative joint disease and intervertebral disc disease of the lumbosacral spine, and possible spondylolysis of the lumbosacral spine. Dr. Simon concluded:

> "This patient has had no objective studies to determine an organic basis for her symptoms since 1982. By that I mean none of the records that I have reviewed indicate that she underwent EMG [electromyogram], MRI [magnetic resonance imaging], CAT [computerized axial tomography] scan, myelogram studies. The patient herself states that she has not undergone any of these studies. I do think it is time for us to try and determine if she has any problems that can be identified as cause for her symptoms other than her degenerative changes.
>
> "The only report that I have concerning her condition since I saw her is a report from David Schwartz, M.D. from Philadelphia Health Associates dated April 10, 1987 which gives the diagnosis as 'chronic cervical strain and chronic lumbosacral strain with occasional radiculopathies.'
>
> "This obviously is not an adequate diagnosis to explain what the patient says is continued symptoms since 1982."

* * *

"At the present time, the only findings are those of progressive degenerative changes in her neck and back and these certainly would not be causally related to one episode of trauma occurring in 1982 or in 1985.

"On a subjective basis, the patient says she cannot do her work. I can not find any objective reasons why she could not return to work. The degenerative changes in her neck and back may be causing her symptoms but there is no evidence that she has a disc herniation or fracture or dislocation or serious lumbar stenosis problem that would functionally incapacitate her."

At Dr. Simon's request, Dr. Michael L. Brooks, a Board-certified radiologist, performed a computerized tomography (CT) scan of appellant's lumbosacral and cervical spine on November 13, 1989. Dr. Brooks stated that this study showed "Broad-based central, with superimposed focal, right-sided mild herniation L5- S1," "Facet degenerative changes without stenosis at L3 through S1," "Small central disc protrusion C4-5," and "Mild left-sided neural foraminal narrowing secondary to small osteophyte C5-6."

In a report dated November 15, 1989, Dr. Simon stated that he agreed with Dr. Brooks' interpretation of the CT scan. Dr. Simon then stated:

"Therefore, we now have objective evidence that this patient has cervical discogenic abnormalities beyond degenerative changes both in her neck and back. These would now allow us to first of all explain some of her subjective symptoms and second, tailor a work program for her which would not put

> extra strain on her neck and back. Any such work program would be one in which she would have to do sedentary work without lifting beyond 10 pounds and she would be allowed to stand and sit as her comfort desired."
>
> * * *
>
> "I do think her discogenic abnormalities in her neck and back are enough to partially disable her but certainly not to totally disable her from returning to some form of work presuming that she is conditioned properly."

An Office medical adviser reviewed the medical evidence on December 19, 1989 and stated that she concurred with Dr. Simon that appellant's continuing complaints were entirely due to preexisting progressive degenerative changes rather than to her employment injuries. In a report dated April 4, 1990, Dr. Schwartz diagnosed chronic cervical strain and chronic lumbosacral strain, and concluded: "Due to the severe pain in the low back and neck with any activity including prolonged standing, walking, minimal lifting, carrying or pushing, [appellant] is totally disabled from work."

The Office found that there was a conflict of medical opinion, and on October 22, 1991 referred appellant, the case record and a statement of accepted facts to Dr. John T. Williams, a Board-certified orthopedic surgeon, to resolve the conflict. In a report dated January 21, 1992, Dr. Williams extensively described appellant's complaints and her findings on physical examination. Dr. Williams then concluded:

"The patient presents to the office today stating that she incurred injury during the course of her employment approximately nine years ago, in 1982. She states that she was working over head dispatching mail in what she called a 'speed element.' She states that she began to experience discomfort in her back and neck. This type of injury is a pull-plus stress fatiguing soft tissue injury which is self-resolving. She stated that she returned to work approximately three years later in a light-duty capacity and she states that she has a recurrence of her discomfort and she has been out of work ever since.

"She states that she had diagnostic studies performed in November 1989 and we obtained faxed reports of the CT scan of the cervical and lumbar spine. These findings are on the basis of degenerative pathology in her neck and back. The patient is a 48-year-old female and these changes are compatible with degenerative pathology: i.e., a broad based central, with superimposed focal right-sided mild herniation at L5, S1 with facet changes all the way from L3 through S2. In the cervical spine there is evidence of a small central disc protrusion at C4, C5 and mild left-sided neural foraminal narrowing secondary to small osteophytes.

"These changes are compatible with the patient's age and with degenerative pathology and they were not caused by a work-related injury of 1982 or aggravated by the incident in 1985. The mechanism of injury does not correlate to the findings on the CT scans. The mechanism of injury was a soft tissue

self-resolving type of muscle sprain strain or ligamentous sprain.

"On my physical examination today there are no positive objective findings to correlate to her complaints. I see no residual pathology as it relates to the injury of 1982 or 1985. I feel that she has recovered to the extent that she is able to be gainfully employed. She has degenerative changes in her cervical and lumbar spine which are compatible with her age and her type of body build. She is obese.

"I feel that she is able to resume her normal duties without any restrictions. If I were to place any restrictions on this patient they would be on the basis of the degenerative pathology which obviously preexisted the work-related injury of 1982. The restrictions would be related to the degenerative changes in her cervical and lumbar spine."

In a report dated March 4, 1992, Dr. Williams stated that he had now reviewed the medical records the Office provided to him. Dr. Williams stated:

"[T]his degenerative pathology [in appellant's lumbar and cervical spine] is part and parcel of the normal aging process and has been aggravated by the patient's weight. Since the day of her accident she has been carried with a diagnosis of a cervical and lumbosacral sprain. These types of sprain strains are of a temporary and transitory nature and are self-resolving. The work-related incident may have aggravated the preexistent pathology but again on a temporary and transitory nature which

resolved leaving her with her preexistent pathology."

After reviewing reports of x-ray findings from 1982, 1984 and 1987, Dr. Williams stated:

"These studies were normal in 1982 and in 1984. Three years later in 1987 we see changes.

"The patient had not been working during this interval so there is no work-related trauma that produced the findings noted on x-rays in 1987. So it was on the basis of the normal wear and tear that she began to show signs of degenerative pathology in 1987."

Dr. Williams then reviewed the findings of the 1989 CT scan and stated:

"So what we are seeing here is the progression of degenerative joint and degenerative disc disease over a period of approximately seven years secondary to the normal wear and tear on the body and the aging process.

"The work-related injury did not cause the degenerative pathology first noted in 1987."

On July 10, 1992 the Office notified appellant of the proposed termination of her compensation on the basis that the medical evidence indicated no continuing disability as a result of her work injuries. Appellant submitted a report dated May 28, 1992 from Dr. Schwartz, who described her symptoms and findings on physical examination, and stated: "[Appellant's] medical condition was a work-related injury and, since she has

essentially never recovered after that injury, this still must be considered a work-related disability."

By decision dated September 2, 1992, the Office terminated appellant's compensation on September 20, 1992 on the basis that the weight of the medical evidence, represented by the reports of Dr. Williams, the impartial medical specialist resolving a conflict of medical opinion, established that the effects of appellant's April 5, 1985 and May 11, 1982 injuries had ceased.

Appellant requested a hearing before an Office hearing representative, which was held on September 23, 1993. Appellant described her two employment injuries and their sequelae, and testified that her back pain had never stopped since these injuries and that she was unable to work due to pain.

By decision dated November 24, 1993, an Office hearing representative found that the opinion of Dr. Williams, the impartial medical specialist resolving a conflict of medical opinion, established that the effects of appellant's May 11, 1982 and April 5, 1985 injuries had ceased by September 20, 1992.

Appellant requested reconsideration, and submitted an October 13, 1993 report from Dr. Philip J. Spinuzza, an osteopath, diagnosing chronic pain syndrome, deconditioning and obesity. Dr. Spinuzza stated, "Typically her pain is aggravated by mechanical activity and relieved by recumbency."

By decision dated March 25, 1994, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

By letter dated February 27, 1995 appellant, through her attorney, requested reconsideration, contending that Dr. Williams was not an impartial medical specialist entitled to special weight, as Dr. Simon's November 15, 1989 report did not conflict with the conclusions of Dr. Schwartz but rather agreed with them. Appellant also contended that Dr. Williams' report was "based upon what are now improper leading questions in that there was never a conflict of medical opinion," that Dr. Williams did not review the results of the November 13, 1989 CT scan, and that it was improper for Dr. Williams to review appellant's medical records after his examination and initial report.

By decision dated June 6, 1995, the Office found that the argument submitted was insufficient to warrant modification of its prior decisions.

The Board finds that the weight of the medical evidence establishes that appellant's disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992.

The Board has stated that the weight of medical evidence is determined by its reliability, its probative value, its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion are factors which enter into such evaluation.[1]

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[1] *Melvina Jackson*, 38 ECAB 443 (1987); *Naomi A. Lilly*, 10 ECAB 560 (1959).

In the present case, the reports from Dr. Williams, a Board-certified orthopedic surgeon to whom the Office referred appellant, constitute the most reliable and probative evidence on the question of whether appellant's disability in 1992 continued to be related to her May 8, 1982 and April 5, 1985 employment injuries. Dr. Williams reviewed the prior medical evidence, reported findings of an extensive examination of appellant, and, most importantly, provided convincing rationale that appellant's continuing disability was not related to her employment injuries. Noting that x-ray studies in 1982 and 1984 were normal but that 1987 x-rays showed degenerative changes, Dr. Williams stated, "The patient had not been working during this interval so there is no work-related trauma that produced the findings noted on x-rays in 1987. So it was on the basis of the normal wear and tear that she began to show signs of degenerative pathology in 1987." Additional rationale by Dr. Williams includes: "The mechanism of injury does not correlate to the findings on the CT scans,"[2] that the "degenerative changes in her cervical and lumbar spine . . . are compatible with her age and her type of body build," and that the "degenerative pathology . . . obviously preexisted the work-related injury of 1982." Dr. Williams' opinion is bolstered by that of another Board-certified orthopedic surgeon, Dr. Glazer, who concluded that appellant's strain or sprain, the condition accepted by the Office, resolved long ago.

In contrast with the reports of Dr. Williams, the reports from appellant's attending physician, Dr. Schwartz, are not based on a complete history, as they

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[2] Earlier in his January 21, 1992 report, Dr. Williams makes it clear that he reviewed the November 1989 CT scans.

do not show any awareness of the results of the November 13, 1989 CT scan.[3] Unlike Dr. Williams, Dr. Schwartz, a Board-certified internist and cardiologist, is not a specialist in the appropriate field of medicine.[4] The only rationale that Dr. Schwartz provided for his opinion that appellant had not recovered from her employment injuries by 1992 was that her pain began at the time of her May 8, 1982 employment injury and had not resolved. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relation.[5] For these reasons, the reports of Dr. Schwartz are entitled to less probative value than those of Dr. Williams.

Appellant is correct in arguing that Dr. Williams was not an impartial medical specialist because there was no conflict of medical opinion at the time of the Office's referral to Dr. Williams.[6] The reports of Dr. Simon, the Board-certified orthopedic surgeon whose second opinion was the basis of the Office's declaration of a conflict of medical opinion, were not sufficient to create such a conflict. In his report dated October 25, 1989, Dr. Simon stated that appellant's "only findings are

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[3] Reports based on an incomplete or inaccurate history are of reduced probative value. *James A. Wyrich*, 31 ECAB 1805 (1980).

[4] The opinions of physicians who have training and knowledge in a specialized field have greater probative value concerning medical questions peculiar to that field than the opinions of other physicians. *Elmer L. Fields*, 20 ECAB 250 (1969).

[5] *Thomas D. Petrylak*, 39 ECAB 276 (1987).

[6] There is, however, no evidence in the case record to support appellant's contention that the Office asked Dr. Williams leading questions.

those of progressive degenerative changes in her neck and back and these certainly would not be causally related to one episode of trauma occurring in 1982 or in 1985" and that "there is no evidence that she has a disc herniation or fracture or dislocation or serious lumbar stenosis problem that would functionally incapacitate her." In his report dated November 15, 1989, Dr. Simon stated that a CT scan done on November 13, 1989 showed "objective evidence that this patient has cervical discogenic abnormalities beyond degenerative changes both in her neck and back." While Dr. Simon did not attribute these "discogenic abnormalities beyond degenerative changes" to appellant's employment injuries, his November 15, 1989 report casts serious doubt on the conclusion in his October 25, 1989 report that appellant had only progressive degenerative changes.

Even though the reports of Dr. Williams are thus not entitled to the special weight afforded to the opinion of an impartial medical specialist resolving a conflict of medical opinion,[7] his reports can still be considered for their own intrinsic value[8] and can still constitute the

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[7] In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight. *James P. Roberts*, 31 ECAB 1010 (1980).

[8] *See Myrtle C. Pittman, on petition for recon.*, 40 ECAB 880 (1989) for a discussion of the use or exclusion of reports of purported impartial medical specialists where a conflict of medical opinion was mistakenly identified by the Office.

weight of the medical evidence.[9] For the reasons stated above, the Board finds that the reports of Dr. Williams constitute the weight of the medical evidence and are sufficient to establish that appellant's disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992.

The decision of the Office of Workers' Compensation Programs dated June 6, 1995 is affirmed.

Dated, Washington, D.C.
March 20, 1996

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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[9] *See Leanne E. Maynard*, 43 ECAB 482 (1992) (The Board found that a physician's "opinion is probative even though he was not an impartial medical examiner" and that the opinion of this physician and another physician were sufficient to establish causal relation.); *Rosa Whitfield Swain*, 38 ECAB 368 (1987) (The Board found that a physician was improperly designated as an impartial medical specialist, but that his opinion nonetheless constituted the weight of the medical evidence).

**APPENDIX B**

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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Docket No. 95-2634

IN THE MATTER OF CLEOPATRA MCDOUGAL-SADDLER AND U.S. POSTAL SERVICE, POST OFFICE, PHILADELPHIA, PA

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**ORDER DENYING PETITION FOR RECONSIDERATION**

The Board issued its decision and order in the above-entitled matter on March 20, 1996. The Board found that the weight of the medical evidence established that appellant's disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992.

Appellant filed a petition for reconsideration. The Director of the Office of Workers' Compensation Programs was served with a copy of appellant's petition, and, in reply, requested that it be denied on the ground that no error of fact or law had been cited. Appellant was served with a copy of the Director's reply, but did not respond within the time allotted.

The Board, having duly considered appellant's petition for reconsideration, finds that it fails to establish any error of fact or law in the Board's March 20, 1996 decision and order warranting further consideration.[1]

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[1] *See Virginia Faye Gabbert*, 21 ECAB 149 (1969).

Accordingly, IT IS ORDERED that the petition for reconsideration be and it hereby is denied.

Dated, Washington, D.C.

JUN 18, 1996

/s/ DAVID S. GERSON
DAVID S. GERSON
Member

/s/ WILLIE T.C. THOMAS
WILLIE T.C. THOMAS
Alternate Member

/s/ MICHAEL E. GROOM
MICHAEL E. GROOM
Alternate Member

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 98-1068

CLEOPATRA MCDOUGAL-SADDLER, APPELLANT

*v.*

ALEXIS M. HERMAN, SECRETARY,
U.S. DEPARTMENT OF LABOR, APPELLEE

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PRESENT: MCKEE, RENDELL, *CIRCUIT JUDGES* AND
DEBEVOISE, *SENIOR DISTRICT JUDGE*[*]

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**ORDER**

It is hereby ORDERED that the slip opinion filed in this case on November 17, 1998 be vacated.

By the Court,

/s/ signature illegible

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Circuit Judge
Hon. Theodore A. McKee

Dated: FEB 24 1999
DR/CC: JP2, NMO, KBK

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[*] Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.